

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL C. LUNA,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 260153

Berrien Circuit Court

LC No. 04-403553-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing, creating, delivering or possessing with intent to deliver 50 grams or more but less than 450 grams of a controlled substance, MCL 333.7401(2)(a)(iii), specifically cocaine. The trial court sentenced defendant to 72 to 240 months' imprisonment. We affirm.

While driving an SUV containing several passengers, defendant was stopped by the Michigan State Police for traffic violations; during the stop, one of the passengers threw a small plastic bag containing a white substance out a passenger window. The bag was later determined to contain cocaine. When defendant was processed following his arrest, approximately 150 bills of different currency denominations were observed, folded in half in his right shoe. The total amount of money was \$2,810. At trial, the prosecutor failed to produce the bills. Defendant first argues his constitutional due process rights were violated by this failure or, in the alternative, by the trial court's failure to give the jury a missing evidence instruction. Defendant did not challenge the missing evidence on constitutional grounds at trial and, therefore, the issue is not preserved. Unpreserved constitutional claims are reviewed for plain error affecting substantial rights. *People v McRunels*, 237 Mich App 168, 171-172; 603 NW2d 95 (1999). A defendant is entitled to have all evidence within the prosecutor's control produced at trial if it bears on innocence or guilt. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993).

However, the failure to preserve potentially exculpatory evidence does not deny due process unless bad faith by the police is shown. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). A defendant has the burden of demonstrating that the police acted in bad faith or that the evidence was exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant claims the police acted in bad faith because they did not keep the cash and did not inquire whether the cash had to be produced at trial. He notes the prosecutor was surprised that the police did not photograph the money or keep it as evidence. Defendant's

arguments do not establish bad faith by the police. The record discloses it was procedure to take cash to the bank within 24 hours for liability reasons. The police followed procedure. While they did not photograph the money, they recorded the number and denominations of the bills, and the record does not reveal that the currency was distinguishable from other currency.

Moreover, defendant cannot demonstrate that the evidence was exculpatory. Evidence is material and exculpatory when (a) it is favorable to the defendant, and (b) there is a reasonable probability that the outcome of the proceedings would have been different if the evidence had been admitted. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). If the proffered purpose for presenting the evidence was to prove a proposition not in issue, the evidence is immaterial. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, mod 450 Mich 1212 (1995). Defendant claims the missing evidence would have helped him establish that he did not know there were drugs in his vehicle, that the drugs did not belong to him, and that he was not taking part in a drug transaction. However, defendant has not disavowed ownership of the money. Rather, he claims the money was in his pocket, not his shoe and, therefore, he was not hiding it. This argument relates to a proposition not in the issue – whether he was hiding the money. *Id.* It does not dispel the fact that defendant's possession of the large, unexplained amount of currency, regardless of its location on his body, supported the inference that he was involved in the sale of drugs. Hence, the evidence was neither exculpatory nor material. *Lester*, *supra*.¹

Defendant next argues the trial court violated his constitutional right against cruel and unusual punishment by failing to consider that he might have a drug addiction. We disagree. Defendant's sentence is within the minimum legislative sentencing range and must be affirmed unless premised on inaccurate information. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Because defendant denied drug use during his pre-sentence interview, he was unable to establish an addiction, and the court did not rely on inaccurate information. In any event, defendant has not demonstrated that a downward departure was warranted from the minimum sentencing range. *Babcock*, *supra* at 261-262 (A departure is warranted only when there is a substantial and compelling reason).

Defendant next argues he was denied his constitutional rights when the trial court scored offense variable (OV) 14, MCL 777.44, at ten points because defendant did not admit, and the jury did not find, that he was a leader in a multiple offender situation. Defendant's argument is premised on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). Our Supreme Court found the rules articulated in these cases did not impact Michigan's sentencing scheme. *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004); *People v Drohan*, 475 Mich 140, 143, 164; 715 NW2d 778 (2006). Defendant's argument is therefore without merit.

¹ Defendant also argues the trial court erred by not giving the jury a missing evidence instruction. Because defendant initialed the back pages of the instructions to indicate his approval, he waived any error in this regard. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, defendant abandoned this issue on appeal by providing cursory treatment only. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant next argues in propria persona that he was denied the effective assistance of counsel when his counsel withdrew a challenge to scoring his prior record variable (PRV) 6, MCL 777.56, at ten points. Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must find the facts and then decide whether they constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* Because defendant failed to move for a new trial or a *Ginther*² hearing, review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and a defendant faces a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that because his counsel withdrew his objection without investigating whether a Class IV felony in Illinois was “in essence” a misdemeanor, he provided ineffective assistance. We disagree. The prosecutor produced evidence that defendant was charged in Illinois with possession of a controlled substance, a Class IV felony. Defendant has presented no authority for his contention that counsel was required to ascertain the equivalent charge in Michigan to determine the scoring of PRV 6. He also presents no authority to support his claim that a class IV felony in Illinois is in fact the equivalent of a misdemeanor in Michigan. Because there is no mistake apparent on the record in the scoring of PRV 6, defendant's claim fails.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).